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Supreme Court, U.S.
FILED

No. 00-001054

DEC 26 2000
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IN THE

# Supreme Court of the United States

TOMMY RANDELL,

*Petitioner,*

*v.*

GARY L. JOHNSON, ET AL.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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December 26, 2000

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

29 pp

## QUESTION PRESENTED

Whether a former state prisoner, not "in custody" under 28 U.S.C. § 2254(a), may bring an action under 42 U.S.C. § 1983 to establish the unconstitutionality of past confinement "without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy," in line with *Spencer v. Kemna*, 523 U.S. 1, 21 (1998) (Souter, J., joined by O'Connor, Ginsburg, and Breyer, JJ.); *id.* at 21-22 (Ginsburg, J., concurring); *id.* at 25 n.8 (Stevens, J., dissenting).

## PARTIES TO THE PROCEEDING

The petitioner in this case is Tommy Randell, plaintiff-appellant in the U.S. Court of Appeals for the Fifth Circuit.

The respondents, defendants-appellees in the Fifth Circuit, are Gary L. Johnson, Director, Texas Department of Criminal Justice, Institutional Division; Melinda Bozarth, Director, Texas Board of Pardons and Paroles; and John Does I and II.

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## OPINIONS BELOW

The decision of the U.S. Court of Appeals for the Fifth Circuit (App. 1a-4a) is reported at 227 F.3d 300. The decision of the district court (App. 5a-7a) is unreported.

## JURISDICTION

The court of appeals decision was entered on September 26, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Section 1 of the Civil Rights Act of 1871, codified at 42 U.S.C. § 1983, provides in relevant part:

> **§ 1983. Civil action for deprivation of rights**
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

The federal habeas corpus statute covering persons in state custody, 28 U.S.C. § 2254, provides in relevant part:

> **§ 2254. State custody; remedies in Federal courts**
>
> **(a)** The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

## STATEMENT OF THE CASE

On June 18, 1999, petitioner Tommy Randell filed this federal court lawsuit pursuant to 42 U.S.C. § 1983. App. 5a. He alleged that officials of the State of Texas (respondents in this Court) had caused him to serve sixty-eight (68) months on a sentence of only sixty (60) months. Complaint ¶ 4. He was incarcerated for the extra eight months in connection with a DWI charge between September 27, 1996, and June 25, 1997, on a "blue warrant" that prevented him from making bail. App. 2a.[1]

Randell was never given credit for the eight months in serving the remainder of his 60-month sentence "and therefore had to serve the time over again." App. 2a; Complaint ¶ 5. On the date Randell filed his Section 1983 lawsuit he had already served the entire 60-month sentence, plus the eight months he was forced to serve again. *Id.* As relief for the eight months he was forced to serve twice, Randell sought solely money damages. Complaint ¶ 6.

The district court dismissed Randell's lawsuit based on this Court's decision in *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994). App. 7a. The court held that because Randell was

> challenging the fact or duration of his confinement . . . he must pursue his claim through a writ of habeas corpus before seeking damages under § 1983. Therefore, Plaintiff's civil rights complaint is dismissed without prejudice to Plaintiff's right to seek federal habeas relief after his state remedies have been exhausted.

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[1] A "blue warrant" is a warrant issued by the Parole Division of the Texas Department of Criminal Justice for the arrest of a person suspected of violating his or her parole. *See, e.g., Board of Pardons & Paroles ex rel. Keene v. Court of Appeals for Eighth Dist.*, 910 S.W.2d 481, 482 (Tex. Crim. App. 1995); *Dean v. Texas*, 900 S.W.2d 367, 367 (Tex. App.—Texarkana 1995), *pet. dism'd*, 928 S.W.2d 567 (Tex. Crim. App. 1996); *Franklin v. Kyle*, 899 S.W.2d 405, 406 n.1 (Tex. App.—Waco 1995). *See also* Tex. Govt. Code §§ 508.251(a), 508.252(2) & (3), 508.254.

App. 7a; *see also* App. 6a ("When a state prisoner seeks to challenge the fact of confinement and resolution of his claim results in speedier or immediate relief, the appropriate federal remedy is a writ of habeas corpus.").

Randell, having fully served his 60-month sentence (and then some), was no longer "a person in custody" within the meaning of 28 U.S.C. § 2254(a) and thus was unable to pursue habeas relief. App. 2a. He appealed the dismissal of the case to the U.S. Court of Appeals for the Fifth Circuit. On appeal, Randell reiterated that he had already fully served his 60-month sentence, that his Section 1983 lawsuit did not seek his release from custody, and that his sole claim was for money damages on account of having been forced to serve eight months beyond his lawful sentence. Notice of Appeal filed September 24, 1999, at 2-3, 5; Appellant's Brief filed January 26, 2000, at 1, 6-9.

The court of appeals affirmed. In so doing, it agreed that on the date Randell filed his Section 1983 lawsuit he "was no longer in custody for the term of confinement in dispute and therefore was ineligible for federal habeas relief." App. 2a & n.2 (citing 28 U.S.C. § 2254(a)). Nonetheless, the court held that Randell's lawsuit could not be heard in light of the following passage of the opinion of this Court in *Heck v. Humphrey*:

> We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, [footnote omitted] a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254.

App. 2a-3a (quoting *Heck*, 512 U.S. at 486-87). Based on *Heck*, the court of appeals stated: "Because Randell is seeking

damages pursuant to § 1983 for unconstitutional imprisonment and has not satisfied the favorable termination requirement of *Heck*, he is barred from any recovery and fails to state a claim upon which relief may be granted." App. 3a.

The court of appeals acknowledged that the Second, Sixth and Seventh Circuits had reached a contrary result. These circuits predict, based on statements of five current Justices of this Court delivered in *Spencer v. Kemna*, 523 U.S. 1 (1998), that "if presented with the question" this Court "would relax *Heck*'s universal favorable termination requirement for plaintiffs who have no procedural vehicle to challenge their conviction." App. 3a & n.4 (citing cases).[2] The court instead sided with the First and Ninth Circuits which do not view the *Spencer* opinions as decisive. It stated that "we decline to announce for the Supreme Court that it has overruled one of its decisions," and it affirmed the dismissal of Randell's case based on the broad statement in *Heck*. App. 4a & n.5 (citing cases).

## REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to resolve the existing circuit split over the import of several past opinions of this Court concerning the jurisdictional relationship between 28 U.S.C. § 2254 and 42 U.S.C. § 1983. By granting certiorari this Court can settle a jurisdictional issue that frequently arises in the federal courts, providing needed guidance on the interrelationship between habeas corpus and Section 1983 litigation.

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[2] In this connection, the court stated that "Randell has not shown that such a procedural vehicle is lacking; he speaks only of inability to obtain habeas relief." App. 3a. The district court held that habeas relief was the proper remedy for Randell's challenge to his confinement, and made no suggestion that Randell was required to pursue some sort of other procedural vehicle. App. 6a. Nor did the district court (or defendants) identify any other potentially relevant procedural vehicle.

**1.** In several decisions handed down over the course of the past three decades, this Court has worked to harmonize the functioning of two separate federal statutes whose text permits state prisoners access to federal court to redress grievances related to their confinement in state prisons. The most specific statute, 28 U.S.C. § 2254(a), provides that "a person in custody pursuant to the judgment of a State court" may file a habeas corpus action alleging a violation of federal law. A much more general statute, 42 U.S.C. § 1983, entitles *any* "person within the jurisdiction" of the United States — including prisoners in state custody — to file suit against state actors who deprive them of their federal rights.

The basic problem that this Court and lower courts have confronted is that if Section 1983 were interpreted to permit state prisoners to bring *all* claims alleging any sort of federal law violation by state actors, state prisoners could circumvent the various restrictions on federal habeas corpus relief simply by citing Section 1983 instead of Section 2254(a) in requesting that their convictions be overturned and/or that the length of their confinement be cut short. This Court has declined to read Section 1983 as authorizing such circumvention.

Initially, state prisoners relied on Section 1983 to challenge the deprivation of good-time credits, explicitly seeking to shorten the period of their confinement. After a divided *en banc* Second Circuit authorized such use of Section 1983, this Court granted certiorari to address what it viewed as an "important problem in the administration of federal justice" arising from "the interrelationship of two important federal laws." *Preiser v. Rodriguez*, 411 U.S. 475, 482 (1973).

The prisoner plaintiffs in *Preiser* who sought to shorten their confinement through the restoration of good-time credits were explicit in attempting to circumvent the normal habeas corpus process. They conceded "that they could have proceeded by way of habeas corpus" and sought "to avoid the necessity of first seeking relief in a state forum," insisting that they had the right to seek early release under "the literal terms" of Section

1983. *Id.* at 488. This Court rejected that argument. It stated that although Section 1983 is a "general" statute,

> despite the literal applicability of its terms, the question remains whether the specific federal habeas corpus statute, explicitly and historically designed to provide the means for a state prisoner to attack the validity of his confinement, must be understood to be the exclusive remedy available in a situation like this where it so clearly applies.

*Id.* at 489. Instead, the Court ruled that the habeas corpus statute provided the exclusive remedy in such circumstances, observing that "[i]n amending the habeas corpus laws in 1948, Congress clearly required exhaustion of adequate state remedies as a condition precedent" to habeas relief, and that the congressional purpose would be "wholly frustrate[d]" if prisoners "could evade this requirement by the simple expedient of putting a different label on their pleadings." *Id.* at 489-90. The Court added that policy concerns, including "considerations of federal-state comity," also favored this result. *Id.* at 490-92.

The *Preiser* holding was narrow in one key respect. The Court noted that the prisoners who had brought the litigation were seeking only the equitable relief of "restoration of their good-time credits," and hence earlier release, and had "sought no damages," so that the Court's holding was "limited to that situation." *Id.* at 494. Thus, the *Preiser* holding would not prevent prisoners from filing Section 1983 claims for damages:

> If a state prisoner is seeking damages, he is attacking something other than the fact or length of his confinement, and he is seeking something other than immediate or more speedy release — the traditional purpose of habeas corpus. In the case of a damages claim, habeas corpus is *not* an appropriate or available federal remedy. Accordingly, as petitioners themselves concede, a damages action by a state prisoner could be brought under the Civil Rights Act in federal

> court without any requirement of prior exhaustion of state remedies.

*Id.* at 494 (citation omitted). *See also Wolff v. McDonnell*, 418 U.S. 539, 579 (1974) (summarizing *Preiser* rule that "only in habeas actions may relief be granted which will shorten the term of confinement.").

Given the factual posture of *Preiser*, in which the prisoners had not sought damages, left open was the issue of whether a prisoner's "§ 1983 suit for damages stemming from an unlawful conviction" could be entertained before the prisoner had exhausted state-court attacks on the conviction itself. *Tower v. Glover*, 467 U.S. 914, 923 & n.6 (1984). The Court addressed that issue in *Heck v. Humphrey*, 512 U.S. 477 (1994), involving a prisoner's Section 1983 claim for damages "challenging the legality of his conviction." *Id.* at 479-80 & n.2, 482.

In that case, petitioner Roy Heck was serving a 15-year sentence for killing his wife. While the direct appeal from his Indiana state court conviction was pending, Heck filed a Section 1983 action in federal court complaining of unconstitutional conduct involving the investigation of his wife's death and the procedures at his trial. He sought money damages but, in light of *Preiser*, he refrained from seeking an injunction ordering his release. *Id.* at 478-79. The court of appeals upheld the dismissal of the lawsuit because it directly implicated the legality of Heck's confinement and, if Heck obtained a ruling that his conviction was illegal, the State of Indiana would be obliged to release him even though he had not sought that relief. *Id.* at 479-80.

Arguing for affirmance in this Court, the State of Indiana and its *amici* States emphasized that if incarcerated prisoners such as Heck could pursue Section 1983 litigation simply by limiting their request for relief to money damages, nothing would be left of the *Preiser* rule, as practically speaking prisoners would be able to win their release by simply winning their

Section 1983 litigation.[3] The Court in *Heck* unanimously refused to permit this result. *Id.* at 483-90 (opinion of the Court); *id.* at 490-91 (Thomas, J., concurring); *id.* at 498-99 (Souter, J., joined by Blackmun, Stevens and O'Connor, JJ., concurring in the judgment). The Justices in *Heck* all agreed that Heck's Section 1983 claim should be dismissed, as he was currently in custody and had filed a Section 1983 damages action challenging his conviction or confinement without having previously won habeas relief, and that all similarly situated prisoners should likewise have their Section 1983 claims dismissed.

However, the Justices disagreed by a 5-to-4 vote over what effect, if any, the Court's holding in *Heck* would have on "former state prisoners who, because they are no longer in custody, cannot bring postconviction challenges." *Id.* at 490 n.10 (opinion of the Court). The majority of the Court noted that this concern was a speculative one, as "no real-life example comes to mind." *Id.* But the majority suggested that in such a situation "the principle barring collateral attacks" on criminal convictions would not be "rendered inapplicable by the fortuity that a

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[3] *See* Brief for Respondents at 23-24 (No. 93-6188) ("the fact that petitioner has sought only damages does nothing to alter that he is demanding a 'determination that he is entitled to immediate release.' *Preiser*, 411 U.S. at 500. . . . Petitioner contends that he is entitled to damages because he should not be confined, yet insists that he does not want in *this* proceeding to be released. The courts surely must assume, however, that a favorable judgment in this case would inexorably lead to another proceeding in which petitioner does seek his release. It is wholly unrealistic to view the limited request for relief as anything but a temporary form of self-restraint, designed only to avoid the exhaustion requirement but not meaningfully to alter what will ultimately be the result."); Brief of the States of Arizona, et al., as *Amici Curiae* in Support of Respondents at 26 (No. 93-6188) ("If a prisoner is not required to exhaust his state remedies before bringing a § 1983 action raising issues that call into question the validity of his conviction — the fact or duration of his confinement — no matter what forms of relief he directly requests in that § 1983 action, he may use that federal ruling to eventually obtain release. He will also avoid the other limitations of habeas. This type of end run around habeas procedures cannot be permitted.").

convicted criminal is no longer incarcerated." *Id.*

The majority's discussion of the impact of its *Heck* holding on a hypothetical future case brought by a person no longer in custody was addressed in the opinion of Justice Souter concurring in the judgment, which drew four votes. The holding in *Heck*, as Justice Souter understood it, was that to avoid a conflict between the "general" Section 1983 statute and the "specific" habeas corpus statute, a "person in custody" who is attacking his or her conviction or length of confinement must proceed under the habeas corpus statute. *Id.* at 497-500. "The Court's opinion can be read as saying nothing more than" this, Justice Souter observed. *Id.* at 500. He added that this "would be a sensible way to read the opinion," as any broader reading that would require a person not in custody to obtain habeas relief before he or she could file a Section 1983 action would "deny any federal forum for claiming a deprivation of federal rights to those who cannot first obtain a favorable state ruling," such as those "who were merely fined . . . or who have completed short terms of imprisonment, probation, or parole, or who discover (through no fault of their own) a constitutional violation after full expiration of their sentences." *Id.*

Four years later, this Court's consideration of how the *Heck* ruling might affect persons not in custody moved beyond the hypothetical to the actual.[4] In *Spencer v. Kemna*, 523 U.S. 1 (1998), the Court addressed whether a state prisoner's habeas corpus claim attacking the revocation of his parole had become moot upon the expiration of his sentence. Petitioner Randy Spencer argued that one reason his claim could not be moot was that, under *Heck*, even though he was no longer in custody he

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[4] In the interim, this Court applied its *Heck* ruling, in another case brought by a prisoner who was still in custody, to unanimously block the Section 1983 lawsuit brought by the prisoner to the extent that his attack on the procedures that had been used to revoke his good-time credits implied the invalidity of that revocation. *Edwards v. Balisok*, 520 U.S. 641, 645-48 (1997); *id.* at 649-50 (Ginsburg, J., joined by Souter and Breyer, JJ., concurring).

could not file a Section 1983 lawsuit seeking damages for the parole revocation unless he first obtained habeas relief. *Id.* at 17. The Court, by an 8-to-1 vote, rejected this argument. *Id.* (opinion of the Court); *id.* at 19 (Souter, J., joined by O'Connor, Ginsburg and Breyer, JJ., concurring).

Justice Souter's concurring opinion elaborating on this aspect of the mootness analysis, which drew the explicit support of five Justices, rejected Spencer's characterization of the *Heck* holding as follows: "*Heck* did not hold that a released prisoner in Spencer's circumstances is out of court on a § 1983 claim, and for reasons explained in my *Heck* concurrence, it would be unsound to read either *Heck* or the habeas statute as requiring any such result." *Id.* at 19; *see also id.* at 19-20 (noting that *Heck* "did not present" the situation of "a released prisoner," so that the majority opinion addressed only a "possibility"); *id.* at 21-22 (Ginsburg, J., concurring); *id.* at 25 n.8 (Stevens, J., dissenting) (stating that it is "perfectly clear" that Justice Souter's analysis of the *Heck* holding is correct).

Although the opinion of the Court in *Spencer* did not explicitly endorse this aspect of the opinion of Justice Souter, neither did it explicitly reject it. Instead, the main opinion only briefly discussed Spencer's argument concerning the *Heck* holding, stating that this argument rested on the contestable assumption that "a § 1983 action for damages must always and everywhere be available," and adding that "[i]t is not certain, in any event, that a § 1983 damages claim" by Spencer "would be foreclosed." *Id.* at 17. *Cf.* Richard H. Fallon, Daniel J. Meltzer & David L. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 218 (4th ed. 2000 Supp.) (stating that in *Spencer* "[t]he Court did not rule on whether *Heck* barred a § 1983 action initiated by Spencer," and observing that because five Justices joined Justice Souter's opinion in *Spencer*, "Justice Souter's position in *Heck* now appears to command a majority.").

This Court should grant certiorari to resolve, in a concrete context, the scope of the Court's holding in *Heck*. This case squarely presents the issue of whether a former state prisoner

who is no longer "a person in custody" within the meaning of 28 U.S.C. § 2254(a) (and hence not eligible for habeas relief) is, by virtue of his release from custody, thereby jurisdictionally stripped of the ability to bring a lawsuit under 42 U.S.C. § 1983 to establish the unconstitutionality of his past confinement and win damages as the appropriate relief. Under the approach set out by Justice Souter in his *Heck* concurrence, which was endorsed by a total of five Justices in *Spencer*, it would appear that Randell should be permitted to pursue his Section 1983 lawsuit. Under the approach tentatively suggested in footnote 10 of the opinion of the Court in *Heck*, the matter would appear to be in doubt. A grant of certiorari in this case is warranted so that this Court can provide clear guidance to the lower courts, through a definitive holding concerning not a hypothetical claim but an actual claim brought by a person no longer in custody.

**2.** The absence of a clear holding from this Court resolving a claim brought by a Section 1983 plaintiff who is no longer in custody has left the lower courts in conflict over how to read this Court's opinions in *Heck* and *Spencer*. That conflict was succinctly summarized by the Fifth Circuit in its decision below. App. 3a-4a. We briefly review the relevant decisions.

**Second and Seventh Circuits**. Two circuits follow the narrow view of this Court's holding in *Heck* that was enunciated by Justice Souter in his *Heck* and *Spencer* concurrences.

The Second Circuit has issued several decisions adopting this approach. In *Jenkins v. Haubert*, 179 F.3d 19, 20-21 (2d Cir. 1999), the court considered a Section 1983 lawsuit brought by a former state prisoner who alleged that he had been forced to serve 30 days of his sentence in disciplinary segregation, in violation of procedural due process. The court permitted the lawsuit. Noting that the *Heck* decision had "generated confusion in the lower courts," *id.* at 25, the Second Circuit relied on the opinions in *Spencer v. Kemna* which "revealed that five justices hold the view that, where federal habeas corpus is not available to address constitutional wrongs, § 1983 must be." *Id.* at 26. On

that basis, it concluded "that nothing in Supreme Court precedent requires that the *Heck* rule be applied to a challenge by a prisoner to a term of disciplinary segregation" and, indeed, "that to apply the *Heck* rule in such circumstances would contravene the pronouncement of five justices that some federal remedy — either habeas corpus or § 1983 — must be available." *Id.* at 27 (citing *Spencer*, 118 S. Ct. at 988-90, 992 n.8 (concurring and dissenting opinions)). Similarly, in *Kim v. Hurston*, 182 F.3d 113, 115, 118 & n.3 (2d Cir. 1999), the Second Circuit ruled that *Heck* did not block a prisoner's Section 1983 lawsuit alleging that she was removed from a work release program in violation of procedural due process.

The Second Circuit expanded on its *Jenkins* holding in *Leather v. Eyck*, 180 F.3d 420 (2d Cir. 1999) (Calabresi, J.). There it held that *Heck* did not prevent a person who was convicted in state court and fined, and who never appealed the conviction, from pursuing Section 1983 litigation alleging that he had been selectively prosecuted by the sheriff in retaliation for speech critical of the sheriff's office. The Second Circiut stated that *Heck* left open the question "whether a plaintiff, convicted of a criminal offense, could proceed with a § 1983 claim where no remedy of habeas corpus existed." *Id.* at 424. It concluded:

> Because Leather is not and never was in the custody of the State, he . . . has no remedy in habeas corpus. Having escaped the jaws of *Heck*, Leather should therefore be permitted to pursue his § 1983 claim in the district court unless principles of res judicata or collateral estoppel preclude his suit.

*Id.* (citation omitted). In *Green v. Montgomery*, 219 F.3d 52 (2d Cir. 2000) (Calabresi, J.), the Second Circuit extended this holding to permit suit by a Section 1983 plaintiff who was incarcerated and who after release filed suit for malicious prosecution. *Id.* at 60 n.3 ("We have held . . . that *Heck* acts only to bar § 1983 suits when the plaintiff has a habeas corpus remedy available to him (i.e., when he is in state custody). Because it

does not appear that Green is presently in custody, his § 1983 action is not barred by *Heck*.") (citations omitted).

The Seventh Circuit has not yet had occasion to issue a square holding on this issue in a case brought by a Section 1983 plaintiff who is not in custody and who alleges damage flowing from his or her state court conviction. But in several decisions it has indicated that it agrees with the Second Circuit that the concurring opinions of Justice Souter in *Heck* and *Spencer* set forth the applicable law in this area. *DeWalt v. Carter*, 224 F.3d 607, 613, 615 & n.4, 616-17 & n.5 (7th Cir. 2000) (indicating that a state prisoner may use Section 1983 to challenge a disciplinary sanction if he is unable to do so through a habeas corpus petition, an "open question" that was not at issue in *Heck*); *Hoard v. Reddy*, 175 F.3d 531, 533 (7th Cir. 1999) (Posner, C.J.) (observing that "there is probably an exception to the rule of *Heck* for cases in which no route other than a damages action under section 1983 is open to the person to challenge his conviction"); *Carr v. O'Leary*, 167 F.3d 1124, 1127 (7th Cir. 1999) (Posner, C.J.) (considering a Section 1983 lawsuit by a released state prisoner complaining of the loss of six months good-time credits in violation of due process and observing that "[b]ecause Carr was released from prison after the suit was filed, he could no longer bring a habeas corpus proceeding . . . to get the disciplinary sanction reversed," and that given *Spencer*, "in all likelihood . . . five Justices would not consider the sanction a bar to a section 1983 suit, even though that suit calls into question the validity of the sanction").

**First, Sixth, and Ninth Circuits**. By contrast, the First, Sixth, and Ninth Circuits — in addition to the Fifth Circuit below — read the opinion of the Court in *Heck* as blocking any Section 1983 lawsuit that is brought by a state prisoner, either during or after incarceration, if the plaintiff has not previously won habeas relief or other relief wiping away the conviction or sanction at issue.

In *Figueroa v. Rivera*, 147 F.3d 77 (1st Cir. 1998), the First Circuit considered a Section 1983 lawsuit brought by the family

members of a state prisoner who had died before exhausting his habeas corpus remedies, leading to his habeas petition being dismissed as moot. The lawsuit alleged that the prisoner had been framed by local authorities and sought damages. The First Circuit held that because the Section 1983 claim asserted that the prisoner's "conviction and subsequent imprisonment were unconstitutional," it "must uphold" the dismissal of the claim given this Court's holding in *Heck*, notwithstanding the views set forth by five Justices in *Spencer*. *Id.* at 80-81 & n.3.

In two decisions involving statute of limitations issues, the Ninth Circuit has articulated a similar view of *Heck* as blocking any Section 1983 suit founded upon the invalidity of a conviction unless and until that conviction is invalidated, despite the opinions of five Justices in *Spencer*. *Cabrera v. City of Huntington Park*, 159 F.3d 374, 377, 380 & n.6 (9th Cir. 1998); *Harvey v. Waldron*, 210 F.3d 1008, 1013, 1014-15 n.6, 1016 (9th Cir. 2000) (reaffirming *Cabrera*).

In the aftermath of *Spencer*, the Sixth Circuit initially observed in dictum that "[t]he majority of the Court . . . now clearly excludes from *Heck*'s favorable termination requirement former prisoners no longer in custody." *Schamaeizadeh v. Cunigan*, 182 F.3d 391, 296 n.3 (6th Cir.), *cert. denied*, 528 U.S. 1021 (1999). Recently, however, the court affirmed the dismissal of a Section 1983 lawsuit brought by a prisoner even though he had "long since served his thirty days' detention" of which he complained. *Huey v. Stine*, 230 F.3d 226, 229 (6th Cir. 2000). In doing so, the Sixth Circuit explicitly adopted the view of the First Circuit, concluding:

> Although *Spencer* may cast doubt upon the universality of the "favorable termination" requirement, we will continue to follow the Supreme Court's directly applicable precedent and "leave to the Court 'the prerogative of overruling its own decisions.'"

*Id.* at 230 (quoting *Figueroa*, 137 F.3d at 81 n.3) (in turn quoting *Agostini v. Felton*, 521 U.S. 203, 237 (1997)).

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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December 26, 2000

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## APPENDIX A

FILED
SEP 26, 2000

# United States Court of Appeals
## FOR THE FIFTH CIRCUIT

**No. 99-11092**

TOMMY RANDELL,

Plaintiff-Appellant,

VERSUS

GARY L. JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division; MELINDA BOZARTH, Director, Texas Board of Pardons and Paroles; JOHN DOE, I; JOHN DOE, II,

Defendants-Appellees.

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Appeal from the United States District Court
For the Northern District of Texas

---

Before WOOD*, DAVIS, and BARKSDALE, Circuit Judges.
PER CURIAM:

The district court held that Tommy Randell's 42 U.S.C. § 1983 complaint for damages was frivolous and therefore dismissed his complaint. Because we determine that the complaint fails to state a cause of action upon which relief may be granted, we affirm.

---

* Circuit Judge of the Seventh Circuit, sitting by designation.

## I.

Randell was arrested and charged with driving while intoxicated. He alleges that he was incarcerated from September 27, 1996 until June 25, 1997, pursuant to a warrant from the Texas Board of Pardons and Paroles but was not given credit for this time and therefore had to serve the time over again.

By June 18, 1999, the date on which he commenced this litigation, Randell was no longer in custody for the term of confinement in dispute and therefore was ineligible for federal habeas relief.[2] He therefore pursued relief *in forma pauperis* ("IFP") under § 1983, requesting compensatory damages of $1000 for each day he had "served over his sentence." The district court dismissed Randell's § 1983 complaint as frivolous and Randell appealed. We affirm the district court on the grounds that Randell's complaint fails to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6).

## II.

Randell points out, pro se, that he is no longer in custody and thus can not file a habeas petition. Randell therefore asserts that he does not need to prove that the underlying proceedings upon which his conviction was based have been terminated in his favor, since he can no longer seek habeas relief. However, in *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994), the Court unequivocally stated:

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[2] *See* 28 U.S.C. § 2254(a) (stating that "a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.").

> We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, [footnote omitted] a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254.

Therefore, the Court unequivocally held that unless an authorized tribunal or executive body has overturned or otherwise invalidated the plaintiff's conviction, his claim "is not cognizable under [section] 1983."[3] Because Randell is seeking damages pursuant to § 1983 for unconstitutional imprisonment and has not satisfied the favorable termination requirement of *Heck*, he is barred from any recovery and fails to state a claim upon which relief may be granted.

Based on dicta from concurring and dissenting opinions in *Spencer v. Kemna*, 523 U.S. 1 (1998), three circuits[4] have concluded that the Supreme Court — if presented with the question — would relax *Heck*'s universal favorable termination requirement for plaintiffs who have no procedural vehicle to challenge their conviction. Randell has not shown that such a procedural vehicle is lacking; he speaks only of inability to obtain habeas relief.

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[3] *Heck v. Humphrey*, 512 U.S. 477, 487, 114 S. Ct. 2364, 2372 (1994).

[4] *See Jenkins v. Haubert*, 179 F.3d 19, 26 (2d Cir. 1999); *Shamaeizadeh v. Cunigan*, 182 F.3d 391, 396 n.3 (6th Cir. 1999); and *Carr v. O'Leary*, 167 F.3d 1124, 1127 (7th Cir. 1999).

In the alternative, we decline to announce for the Supreme Court that it has overruled one of its decisions.

We agree with the First Circuit,[5] which stated:

> We are mindful that dicta from concurring and dissenting opinions in a recently decided case, *Spencer v. Kemna*, 523 U.S. 1, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1998), may cast doubt upon the universality of Heck's "favorable termination" requirement. *See id.* at 19, 118 S. Ct. at 989 (Souter, J., concurring); *id.* at 21, 118 S. Ct. at 990 (Ginsberg, J., concurring); *id.* at 18 n.8, 118 S. Ct. at 992 n.8 (Stevens, J., dissenting). The Court, however, has admonished the lower federal courts to follow its directly applicable precedent, even if that precedent appears weakened by pronouncements in its subsequent decisions, and to leave to the Court "the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 236, 117 S.Ct. 1997, 2017, 138 L.Ed.2d 391 (1997); *see also Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989). We obey this admonition.

*Figueroa v. Rivera*, 147 F.3d 77, 81 n.3 (1st Cir. 1998).

**III.**

For the above reasons, the judgment is AFFIRMED.

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[5] The Ninth Circuit also follows this course. *See Cabrera v. City of Huntington Park*, 159 F.3d 374, 380 n.6 (9th Cir. 1998).

**APPENDIX B**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

| | | |
|---|---|---|
| TOMMY RANDELL, | § | |
| TDCJ-ID NO. 844659 | § | |
| | § | |
| Plaintiff, | § | |
| v. | § | FILED |
| | § | SEP 3 1999 |
| GARY JOHNSON, et al., | § | |
| | § | CIVIL ACTION NO. |
| | § | 5:99-CV-188 C |
| Defendants. | § | |

**ORDER**

Plaintiff Tommy Randell, acting *pro se*, filed suit pursuant to 42 U.S.C. § 1983 on June 18, 1999, complaining that he was being denied credit for time he had served. Specifically, Plaintiff alleges that he was arrested in Plainview, Texas, and charged with driving while intoxicated. He remained incarcerated in Plainview from September 27, 1996, to June 25, 1997, pursuant to a warrant from the Texas Board of Pardons and Paroles, but he was not given credit for this time and had actually had to serve the time over again. Plaintiff requests that he be granted compensatory damages in the amount of $1000.00 for each day that he had "served over his sentence."

When a party seeks to proceed *in forma pauperis*, the Court shall dismiss the complaint at any time if the court determines that the complaint is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief from a defendant who is immune from such

relief. 28 U.S.C. § 1915(e)(2)(B). *See* 28 U.S.C. 1915A (providing that a court shall review a prisoner complaint as soon as practicable and dismiss it if it is frivolous or malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief from an immune defendant). A claim is frivolous if it has no arguable basis in law or fact. *Neitzke v. Williams*, 490 U.S. 319 (1989). A claim has no arguable basis in the law if it is based on an indisputably meritless legal theory, "such as if the complaint alleges the violation of a legal interest which clearly does not exist." *Davis v. Scott*, 157 F.3d 1003, 1005 (5th Cir. 1998) (quotation omitted). A claim has no arguable basis in fact if "after providing the plaintiff the opportunity to present additional facts when necessary, the facts alleged are clearly baseless." *Talib v. Gilley*, 138 F.3d 211, 213 (5th Cir. 1998).

When a state prisoner seeks to challenge the fact of confinement and resolution of his claim results in a speedier or immediate release, the appropriate federal remedy is a writ of habeas corpus. *Preiser v. Rodriguez*, 411 U.S. 475, 488-490 (1973). *See Davis v. Fechtel*, 150 F.3d 486, 490 (5th Cir. 1998) (holding that a challenge to the execution of an inmate's sentence and the duration of his confinement should be pursued in a habeas action under 28 U.S.C. § 2241 rather than a civil rights suit under 42 U.S.C. § 1983). The core issue in determining whether a prisoner must pursue habeas relief rather than civil rights actions is to determine whether the prisoner challenges the "fact or duration" of his confinement, or merely the rules, customs, and procedures affecting the "conditions" of his confinement. *Cook v. Texas Dept. of Criminal Justice Transitional Planning Dept.*, 37 F.3d 166, 168 (5th Cir. 1994).

Moreover, if Plaintiff is challenging the "duration" of his confinement, he must first pursue his claim through a writ of habeas corpus in the state courts before he can seek a writ of habeas corpus in federal court. *McGrew v. Texas Board of Pardons and Paroles*, 47 F.3d 158, 161 (5th Cir. 1995).

To the extent that Plaintiff is seeking monetary damages for an allegedly unconstitutional imprisonment, he cannot bring a § 1983 claim until he has had the term of imprisonment reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal, or called into question by a federal court's issuance of a writ of habeas corpus. *Heck v. Humphrey*, 512 U.S. 477, 486-487 (1994). *See Parker v. Fort Worth Police Dept.*, 980 F.2d 1023, 1025 (5th Cir. 1993) (holding that a civil rights claim for damages for illegal detention must exhaust state habeas remedies before pursuing federal habeas remedies).

The Court finds that Plaintiff is challenging the fact or duration of his confinement; therefore, he must pursue his claim through a writ of habeas corpus before seeking damages under § 1983. Therefore, Plaintiff's civil rights complaint is dismissed without prejudice to Plaintiff's right to seek federal habeas relief after his state remedies have been exhausted.

The dismissal of Plaintiff's complaint does not release Plaintiff or the institution where he is incarcerated from the obligation to pay any filing fee previously imposed.

SO ORDERED.

Judgment shall be entered accordingly.

Any pending motions are denied.

Plaintiff is advised that if he appeals this Order, he shall be required to pay the appeal fee of $105.00 pursuant to the Prison Litigation Reform Act, and he must submit an application to proceed *in forma pauperis* and a certified copy of his 6-month Certificate of Inmate Trust Account along with his notice of appeal.

Dated September 3, 1999.

/s/
SAM R. CUMMINGS
United States District Judge

Supreme Court, U.S.
FILED
MAR 15 2001
CLERK

No. 00-1054

# In the Supreme Court of the United States

TOMMY RANDELL,
*Petitioner,*

v.

GARY L. JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION; MELINDA BOZARTH, DIRECTOR, TEXAS BOARD OF PARDONS AND PAROLES; JOHN DOE, I; JOHN DOE, II,
*Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTION PRESENTED FOR REVIEW

Should limitations or exceptions to *Heck v. Humphrey*'s "favorable-termination" prerequisite for §1983 suits be considered in a case in which the plaintiff has not alleged that it was somehow impossible for him to satisfy *Heck*'s requirement, where there is only the barest of factual allegations, and where the issue has not been developed or fully litigated in the courts below?

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No. 00-1054

# In the
# Supreme Court of the United States

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TOMMY RANDELL,
*Petitioner,*

v.

GARY L. JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION; MELINDA BOZARTH, DIRECTOR, TEXAS BOARD OF PARDONS AND PAROLES; JOHN DOE, I; JOHN DOE, II,
*Respondents.*

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On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

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## RESPONDENTS' BRIEF IN OPPOSITION

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Petitioner has not identified any legitimate reason for the Court to revisit its holding in *Heck v. Humphrey*.[1] He has not presented a significant division in the lower courts regarding the proper scope of *Heck*'s "favorable-termination" prerequisite for §1983 suits. He has also failed to allege that it was somehow impossible for him to satisfy that requirement, which would be the only legitimate way to raise the possibility of a limitation on *Heck*'s application. Lastly, this case lacks the necessary factual and issue development to permit meaningful consideration of modification of

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1. 512 U.S. 477 (1994).

the *Heck* rule. All these reasons render this case an inappropriate candidate for the Court's review.

## STATEMENT OF THE CASE

Randell's *in forma pauperis* complaint was dismissed *sua sponte* as frivolous, so all of the factual allegations in Randell's complaint must be accepted as true.[2] Those brief allegations, in their entirety, follow:

> On 9-7-96 while incarcerated in Plainview, TX, for DWI, no bond was available as T.D.C.J. [Texas Department of Criminal Justice] Board of Pardons and Paroles had placed a blue warrant detainer on me preventing me from making any bond and I was not given or granted liberty of freedom in any way, and thus, from 9-27-96 to 6-26-97, I was not credited for all this time I served on this sentence under a detainer and at later time(s) I've had to serve all over again. I have fully served my five year sentence, but still to this day I have never received <u>any credit</u> for this <u>flat time</u> served under this detainer from 9-27-96 to 6-26-97. This time was served under my 655140 T.D.C.J. number. (Complaint ¶V) (emphasis in original).

Randell also states that Respondent Johnson, Director of TDCJ-Institutional Division, is "responsible for the detention past the correct sentence of (5) five years," and that Respondent Bozarth, Director of the Texas Board of Pardons and Paroles, is "responsible for the proper discharge and calculation of time on sentence." (Complaint ¶IV.B).

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2. *Berkovitz v. United States*, 486 U.S. 531, 540 (1988).

Randell appears to allege that at some time before he was arrested for driving while intoxicated, he was sentenced to five years in TDCJ for an unidentified crime and was paroled before serving the complete five-year sentence. Following his DWI arrest, Randell spent the nine months in the Plainview, Texas jail. While he does not explain if these nine months were a sentence for the DWI offense, he claims that he could not make bond on the DWI arrest because TDCJ issued a "blue warrant" on him, which is a prerevocation warrant issued for the arrest of a person suspected of violating his or her parole.[3] After being released from the Plainview jail, he went back to TDCJ one or more times on the pre-existing five-year sentence, presumably due to parole violation, eventually serving the entire five-year sentence in TDCJ. (Complaint ¶V).

Randell contends that because a blue warrant was issued, the nine months in the Plainview jail on the DWI charge should also count as part of his five-year sentence for the unspecified prior crime, and sought solely "compensatory damages of $1,000 [for] each day I served over my sentence." (Complaint ¶V).

Randell does not suggest that he sought habeas relief when TDCJ failed to release him at the allegedly appropriate time. The first challenge to the allegedly unconstitutional additional nine months of confinement appears to be this §1983 lawsuit. When he filed this case, he had completed his five-year sentence but was back in TDCJ on a new sentence. (Complaint ¶V).

Following the Prison Litigation Reform Act's screening requirement, 28 U.S.C. §1915A, the district court *sua sponte*

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3. *See, e.g., Board of Pardons & Paroles v. Court of App. for the Eighth Dist.*, 910 S.W.2d 481, 482 (Tex. Crim. App. 1995); *see also* TEX. GOV'T CODE §§508.251(a), 508.252(2) & (3), 508.254.

dismissed Randell's complaint, citing *Heck v. Humphrey*[4] and its requirement that §1983 plaintiffs seeking monetary damages for an allegedly unconstitutional conviction or term of confinement first obtain a "favorable termination" of that sentence or conviction.[5]

On appeal, the Fifth Circuit affirmed the district court's dismissal on the ground that *Heck* bars petitioner's §1983 claim, citing the following portion of that decision:

> We hold that, in order to recover damages for [an] allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a §1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. 2254.[6]

The Fifth Circuit observed that some courts, based on dicta from concurring and dissenting opinions in *Spencer v. Kemna*,[7] have speculated that, if presented the question, the Court would relax *Heck*'s universal favorable-termination requirement for §1983 plaintiffs with no procedural vehicle to challenge a conviction or

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4. 512 U.S. 477 (1994).
5. App. 7a (citing *Heck*, 512 U.S., at 486-87).
6. App. 3a (citing *Heck*, 512 U.S., at 486-87).
7. 523 U.S. 1, 17 (1998) (deciding, *inter alia*, that a prisoner's release mooted habeas challenge to parole revocation despite potential utility of successful habeas challenge in satisfying *Heck*'s "favorable-termination" requirement).

sentence.[8] The Fifth Circuit went on to state that even if *Heck* were to be relaxed for plaintiffs lacking a procedural vehicle to challenge a conviction or sentence, Randell had failed to allege that he had no available procedural vehicle, but rather complained only of an inability to obtain habeas relief.[9]

## REASONS FOR DENYING THE WRIT

### I. THIS CASE DOES NOT PRESENT THE *HECK* ISSUE POSED BY PETITIONER AND IT IS AN INADEQUATE VEHICLE FOR REVIEWING THAT ISSUE.

Petitioner urges the Court to grant the petition in order to review the question whether convicted persons who have no effective habeas remedy or other vehicle to reverse or call into question a conviction or sentence may challenge their convictions or sentences under §1983, or whether such challenges are impermissible collateral attacks. But this case simply does not raise that question, because Randell did not allege that he could not comply with the requirement because he lacked any other avenue to correct the alleged error in his TDCJ sentence.[10]

In *Spencer v. Kemna*, Justice Souter's concurring opinion revisited *Heck*'s holding and expressed concern that application of

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8. App. 3a & n.4.

9. App. 3a.

10. *See Heck*, 512 U.S., at 486-87 (holding that for a §1983 claim premised on invalid conviction or sentence, plaintiff must "prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination or called into question by a federal court's issuance of a writ of habeas corpus" in order for action to be cognizable).

the favorable-termination requirement could make a §1983 claim unavailable to a convict not in custody simply because of that status.[11] The concurrence, together with the concurrence in *Heck* itself, listed potential scenarios where *Heck*'s requirement might render a plaintiff otherwise eligible for §1983 relief ineligible due simply to not being in custody at the time of suit, *e.g.*, where there is no imprisonment, but only a fine; where there is a short term of imprisonment or parole; where a plaintiff, through no fault of his own discovers a constitutional violation after the sentence has been served; and finally, where the favorable termination requirement would be impossible to satisfy as a matter of law.[12]

Randell does not allege that he sought habeas relief while incarcerated, nor does he address a reason for that failure. He does not allege that through no fault of his own, he discovered a constitutional violation only after the expiration of his sentence; to the contrary, he states he was denied bond at the Plainview jail because of TDCJ's prerevocation warrant. *See* Pet. 2. Randell does not suggest that he attempted to correct the alleged error in his term of confinement through notice to TDCJ via the prison grievance system. Instead of answering the question whether he used the prison grievance system on the standard inmate §1983 lawsuit form used to file this case, Randell crossed out the alternative choices of "yes" and "no" and wrote "not applicable." (Complaint ¶III). Furthermore, he did not allege that he had no other avenues by which to call into question or correct his length of confinement. In sum, Randell did not allege that he was "bound to a favorable-

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11. 523 U.S., at 20-21 & n.* (Souter, J., concurring).

12. *Id.*, at 21 & n.* (Souter, J., concurring); *Heck*, 512 U.S., at 500 (Souter, J., concurring); *see also Spencer*, 523 U.S., at 21 (Ginsberg, J., concurring).

termination requirement that it would be impossible as a matter of law for him to satisfy."[13]

Given the utter absence of allegations that petitioner tried any routes to correct the alleged error, this is clearly not the kind of case that was imagined as a cause for concern in the *Heck* and *Spencer* concurrences heralded by petitioner.[14] Randell was not fined or sentenced to a short term, he did not contend that he lacked a way to satisfy *Heck*'s "favorable termination" requirement, and he has not suggested that he discovered the sentence error only after his release.[15] Randell does not present a case that even warrants exploring the possible circumstances and conditions in which there might be an exception to *Heck*'s prerequisite. As such, petitioner's case could not be a more poorly suited vehicle for consideration of the issue.

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13. *Spencer*, 523 U.S., at 21 (Souter, J., concurring). *See also* App. 3a (noting Randell's failure to do so).

14. *See Spencer*, 523 U.S., at 20-21 & n.* (Souter, J., concurring); *Heck*, 512 U.S., at 500 (Souter, J., concurring); *see also* App. 3a (noting that courts observing that if the question were presented, the Court "would relax *Heck*'s universal favorable termination requirement [only] for plaintiffs *who have no procedural vehicle*") (emphasis added); *Hoard v. Reddy*, 175 F.3d 531, 533 (CA7 1999) (noting that "there is probably an exception to the rule of *Heck* for cases in which *no route* other than a damages action under section 1983 is open to the person to challenge his conviction") (emphasis added).

15. *Heck*, 512 U.S., at 500 (Souter, J., concurring) (expressing concern about such potential circumstances in application of *Heck*); *see also Spencer*, 523 U.S., at 21 (Souter, J., concurring) (suggesting that a §1983 plaintiff not in custody could pursue a claim "without being bound to satisfy a favorable-termination requirement that it would be *impossible* as a matter of law for him to satisfy") (emphasis added).

In addition to the fact that this case does not truly raise the issue identified by petitioner, it is also an inappropriate candidate for the Court's review because it has not been fully litigated. The district court *sua sponte* dismissed the complaint in accordance with its obligation to review prisoner complaints at the earliest possible stage and dismiss those that are frivolous or malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from an immune defendant. *See* 28 U.S.C. §§1915A, 1915(e)(2)(B). The Fifth Circuit briefing involved only petitioner's single, *pro se* brief. The record before this Court includes only that brief together with petitioner's complaint (excerpted in full), filing fee documents and rulings, and the two court orders included in petitioner's appendix.

This case lacks the necessary concrete context in which to review the issue. Without any basic factual allegations, the Court could hardly even begin to consider the issue of lifting *Heck*'s bar in certain circumstances. In addition, there was apparently no prison grievance filed, which would have either resolved petitioner's complaint or contributed some record of dates, sentencing, time served, and TDCJ's position. And the critical fact of whether Randell's nine-month stay in the Plainview jail was part of his DWI sentence or due to the prerevocation warrant remains unclear. Delineating particular parameters for *Heck*'s rule would be a highly fact-bound decision implicating incentives and policy concerns in the areas of §1983 and habeas litigation that the Court could not account for in its consideration of the issue because of the absence of any issue or factual development in this case.[16]

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16. Review of petitioner's proposed issue in the context of this case would border on "advising what the law would be on an uncertain or hypothetical state of facts." *Nashville, C. & St. L. R. Co. v. Wallace*, 288 U.S. 249, 261 (1935).

## II. THERE IS NO CONFUSION IN THE LOWER COURTS REQUIRING THE COURT'S INTERVENTION.

Despite agreement among the First, Fourth, Fifth, and Sixth Circuits that *dicta* in *Spencer*'s concurring opinions did not create a limitation or exception to *Heck*,[17] Randell alleges a division among the circuit courts regarding the scope of *Heck*'s "favorable-termination" requirement for §1983 suits. An examination of the cases, however, reveals that with only slight exception, they present straightforward applications of *Heck*'s requirement and uncontroversial §1983 suits that admittedly fall outside the scope of *Heck*'s requirement. Petitioner does not demonstrate a level of "confusion" warranting the Court's review.

The division outlined by petitioner is shallow at best. He cites decisions from the Second Circuit and Seventh Circuit that he claims reflect confusion by the courts when confronted with §1983 plaintiffs who are no longer in custody. *See* Pet. 11-13. With regard to the Seventh Circuit, however, petitioner admits that it "has not yet had occasion to issue a square holding on this issue," and instead points only to "indicat[ions]" that the Seventh Circuit agrees with the concurring opinions of Justice Souter in *Heck* and *Spencer*. Pet. 13. Indeed, in *Hoard v. Reddy*,[18] a decision cited by petitioner in furtherance of a "split," the Seventh Circuit held the plaintiff to *Heck*'s requirement in a §1983 lawsuit seeking damages for an access-to-courts violation based on hindering the prisoner's ability to litigate a state habeas action, noting that the plaintiff "had no basis for complaining that no route was open to him other than this damages action."[19]

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17. *See* Pet. 13-14.

18. 175 F.3d 531, 533 (CA7 1999).

19. Petitioner's other Seventh Circuit decision addressing *Heck* and *Spencer* did not even reach an application of *Heck*. *See* Pet. 13

Thus, it appears that it is only the Second Circuit that has permitted an exception to *Heck*'s bar, while the other circuits have stayed the course. And the Second Circuit's deviation is hardly an impetus for the Court's review of the urged issue. That court's limitation on *Heck*'s rule does not have its origins in the concerns expressed in the *Heck* and *Spencer* concurrences. Instead, it was a quickly adopted extension by faulty reasoning from the situation of "conditions-of-confinement" cases for which there is no habeas remedy, although §1983 actions are permitted. In *Leather v. Eyck*,[20] a case in which the plaintiff was not imprisoned but fined with a suspended license, the Second Circuit relied on the unavailability of habeas relief in "conditions-of-confinement" cases to conclude that because *Heck* clearly does not apply to such cases—because they do not challenge the validity of convictions or sentences—then *Heck* must not apply to *any* situation in which habeas relief is unavailable. In reaching this conclusion, the Second Circuit failed to explore or even acknowledge the logic behind the two different circumstances, and instead wholesale imported the inapplicability of *Heck* in "conditions-of-confinement" cases into the context of §1983 cases, which do involve challenges to the validity of sentences or convictions. The Second Circuit did not justify curbing *Heck* because its rule would otherwise command some unjust or anomalous result—the only concern which has been hypothesized—and did not consider the effect of other possible avenues of challenge.[21]

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(citing *Carr v. O'Leary*, 167 F.3d 1124, 1127 (CA7 1999) (holding that defendants waived their *Heck* defense to due-process challenge to prison disciplinary proceeding regarding good-time credits)).

20. 180 F.3d 420, 424 (CA2 1999).

21. *See id.*, at 424; *see also id.*, at 422 (noting that plaintiff did not appeal conviction).

In petitioner's only other Second Circuit decision implicating *Heck*'s rule, *Green v. Montgomery*,[22] the court merely cited and restated its *Leather* holding in a footnote,[23] and certified questions regarding issue preclusion to the New York Court of Appeals.[24] Neither Second Circuit decision explores the parameters of *Heck*, and *Green* ironically complies with the spirit of *Heck*'s rule by directing an initial adjudication of the dispositive §1983 issues by the state court, the very informing purpose of *Heck*'s rule.[25]

Armed with only the Second Circuit's two idiosyncratic decisions, petitioner faces the phalanx of decisions applying the *Heck* rule without pause. In *Figueroa v. Rivera*,[26] the First Circuit performed a matter-of-fact application of *Heck* when a prisoner brought a habeas challenge to his conviction, but later died, mooting the action. His heirs then tried to assert the same claims through a §1983 suit, an effort rejected on the ground that the conviction could not be collaterally attacked via a §1983 suit.[27] The court noted that a separate deliberate indifference claim was not subject to *Heck*'s requisite favorable termination.[28] In a variation on a theme, the Ninth Circuit considered in *Cabrera v. City of Huntington Park*[29] the interplay of the accrual of §1983 causes of action for statutes of limitations purposes with the reasoning in *Heck* regarding when §1983 claims become cognizable.[30] The

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22. 219 F.3d 52 (CA2 2000).
23. *Id.*, at 60 n.3.
24. *Id.*, at 61.
25. 512 U.S., at 497-98 & n.4.
26. 147 F.3d 77 (CA1 1998).
27. *Id.*, at 81-82.
28. *Id.*, at 82.
29. 159 F.3d 374, 380-81 (CA9 1998).
30. The Ninth Circuit conducted a similar analysis in *Harvey v. Waldron*, 210 F.3d 1008, 1014-16 (CA9 2000). *See also Shamaeizadeh*

decision built on *Heck*'s foundation, and did so seemingly with ease. The appropriateness of *Heck*'s bar was not at issue in the case because the plaintiff did achieve a prior reversal of his conviction, and other claims did not call into question any conviction or sentence.

In an effort to conjure a circuit split, petitioner also reviews a series of decisions which fail to even implicate *Heck*'s "favorable-termination" prerequisite. Randell cites *Jenkins v. Haubert*[31] to illustrate the Second Circuit's purported adherence to the disinclination in Justice Souter's concurrences to preclude a §1983 claim simply because of the status of being out of custody. In that decision, however, the Second Circuit acknowledged that the case did not even implicate *Heck*'s requirement because the Court "has never announced that the *Heck* rule bars a challenge under §1983 to an administrative or disciplinary sanction that does not affect the overall length or conviction."[32] Likewise, in *DeWalt v. Carter*, another decision cited by petitioner, the Seventh Circuit recognized that *Heck* does not come into play in a §1983 suit alleging a due-process violation at a prison disciplinary hearing which results in a change of conditions of confinement, because the fact or duration of confinement is not under challenge.[33] In *Kim v. Hurston*,[34] the Second Circuit merely noted once again that *Heck* is not implicated

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*v. Cunigan*, 182 F.3d 391, 396-97 (CA6 1999) (considering same issue and reaching same conclusion). *See also* Pet. 14 (acknowledging that cited observation by Sixth Circuit in *Shamaeizadeh* regarding Court's view of scope of *Heck* is "dictum" and that Sixth Circuit has explicitly held that *Spencer* made no inroads on *Heck*'s rule in *Huey v. Stine*, 230 F.3d 226, 230 (CA6 2000).

31. 179 F.3d 19 (CA2 1999).
32. *Id.*, at 27.
33. 224 F.3d 607, 616-18 (CA7 2000).
34. 182 F.3d 113, 118 n.3 (CA2 1999).

in a §1983 lawsuit complaining of conditions of confinement if the prisoner is not challenging the validity of the term of confinement.

These decisions do not reflect any division among the courts, as *Heck* itself explains that its requirement is triggered when a §1983 damages claim "necessarily demonstrates the invalidity of the conviction [or sentence],"[35] because only then could the claimant be said to be "attacking the fact or length of confinement."[36] Any division in the circuit courts is shallow at best and remains undeveloped.

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35. 512 U.S., at 481-82.

36. *Id.*, at 482 (quotation, citation and ellipsis omitted). *See also id.*, at 487 ("[w]hen a state prisoner seeks damages in a §1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; *if* it would, the complaint must be dismissed *unless* the plaintiff can demonstrate that the conviction or sentence has already been invalidated.") (emphasis added); *id.*, at 487 n.7 (stating that a §1983 suit for allegedly unreasonable search may proceed without regard to "favorable termination" because such an action "would not necessarily imply that the plaintiff's conviction was unlawful"); *Edwards v. Balisok*, 520 U.S. 641, 648 (1997) (holding §1983 claim not cognizable under *Heck* because challenge to procedures used in revocation of good-time credits amounted to challenge to sentence and plaintiff had not satisfied *Heck*'s requirement).

## CONCLUSION

For these reasons, the Court should deny the petition.

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Supreme Court, U.S.
FILED
MAR 27 2001
CLERK

No. 00-1054

IN THE

# Supreme Court of the United States

TOMMY RANDELL,

*Petitioner,*

*v.*

GARY L. JOHNSON, ET AL.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## REPLY TO BRIEF IN OPPOSITION

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## REPLY TO BRIEF IN OPPOSITION

Respondents advance two arguments against certiorari. First, they argue that the question presented is not adequately presented by Randell's case. Opp. at 5-8. Second, they argue that there is no clearcut, longstanding conflict in the circuits concerning whether a person not "in custody" under 28 U.S.C. § 2254(a) may bring an action under 42 U.S.C. § 1983 seeking damages relating to a previous criminal conviction or incarceration. We address these arguments in reverse order.

### 1. The lower courts are hopelessly divided over whether the *Heck* decision imposes any barrier to Section 1983 actions filed by persons who are not "in custody" within the meaning of 28 U.S.C. 2254(a)

In its decision below, App. 3a-4a, the Fifth Circuit acknowledged the existence of a circuit split over the breadth of the favorable-termination requirement articulated in *Heck v. Humphery*, 512 U.S. 477 (1994), particularly in light of *Spencer v. Kemna*, 523 U.S. 1 (1998). The petition briefly expanded on this discussion. The Second and Seventh Circuits, in accord with the analysis of five Justices in *Spencer*, view *Heck* as imposing no barrier to a Section 1983 action attacking a conviction or instance of incarceration brought by a person who is not "in custody" within the meaning of 28 U.S.C. § 2254(a). Pet. 11-13. The First, Fifth, Sixth and Ninth Circuits read *Heck* much more broadly as blocking a Section 1983 action unless and until the plaintiff first wins habeas or other relief wiping away the conviction or sanction at issue, even where the plaintiff is not in custody and thus habeas relief is not available. Pet. 13-14.

Respondents argue that the conflict identified by the Fifth Circuit below and explicated by Randell "is shallow at best." Opp. 9. They dismiss as insignificant or wrong the pertinent Second and Seventh Circuit decisions. Opp. 9-12. Respondents err in ignoring the statutory construction of the intersection between the habeas and civil rights statutes that has been

consistently relied upon in those decisions, in the way advocated by five Justices in *Spencer* — a construction that is quite different from the way that several other circuits read these statutes.

Respondents' discussion of *Spencer*, Opp. 5-7, skips over the basic statutory construction involved. In *Spencer*, five Justices "read the 'general' § 1983 statute in light of the 'specific' federal habeas statute, which applies only to persons 'in custody,' 28 U.S.C. § 2254(a), and requires them to exhaust state remedies, § 2254(b)" — a statutory construction that provides "a 'simple way to avoid collisions at the intersection of habeas and § 1983.'" 523 U.S. at 20 (Souter, J., joined by O'Connor, Ginsburg and Breyer, JJ., concurring) (quoting Justice Souter's concurring opinion in *Heck*); *see also id.* at 25 n.8 (Stevens, J., dissenting). Under this statutory construction, *Heck*'s favorable-termination requirement applies only to "inmates seeking § 1983 damages for unconstitutional conviction or confinement . . . lest the plain breadth of § 1983 be unjustifiably limited at the expense of persons not 'in custody' within the meaning of the habeas statute." *Id.* at 20.

This statutory construction creates a bright-line rule for the application of *Heck*'s favorable-termination requirement, one focusing on whether or not the Section 1983 plaintiff is "in custody" within the meaning of 28 U.S.C. § 2254(a). The Second and Seventh Circuits have consistently adhered to that bright-line rule since *Spencer*, regardless of the particular factual context. As the Second Circuit summarized the rule in its leading decision, "where federal habeas corpus is not available to address constitutional wrongs, § 1983 must be." *Jenkins v. Haubert*, 179 F.3d 19, 26 (2d Cir. 1999).[1]

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[1] Ignoring the general statutory construction relied upon in *Jenkins*, respondents suggest that *Jenkins* has little importance because the specific facts of *Jenkins* (involving a prisoner's allegation that he was denied procedural due process prior to being forced to serve 30 days of his sentence in solitary confinement) did not "implicate *Heck*'s 'favorable-termination'

The Second Circuit followed *Jenkins* in two decisions applying this bright-line rule. *Leather v. Eyck*, 180 F.3d 420, 424 (2d Cir. 1999) (Calabresi, J.), permitted a person convicted and fined for a criminal offense, who never appealed his conviction, to file a Section 1983 action alleging selective prosecution because he "is not and never was in the custody of the State" and thus "has no remedy in habeas corpus." In *Green v. Montgomery*, 219 F.3d 52 (2d Cir. 2000) (Calabresi, J.), the Second Circuit addressed a Section 1983 action brought by a juvenile who was convicted on reckless endangerment and stolen property charges and who *after* his release from custody filed a Section 1983 action for damages relating to his arrest and prosecution. *Id.* at 55. The Second Circuit allowed the suit, again applying a bright-line rule. It reiterated "that *Heck* acts only to bar § 1983 suits when the plaintiff has a habeas corpus remedy available to him (i.e., when he is in state custody)." *Id.* at 60 n.3. "Because it does not appear that [plaintiff] is presently in state custody," the court held, "his § 1983 action is not barred by *Heck*." *Id.*

Respondents recognize that both *Leather* and *Green* are decisions "implicating *Heck*'s rule." Opp. 11. However, they dismiss them as "idiosyncratic decisions," Opp. 11, that are based on "faulty reasoning." Opp. 10. To the contrary, these decisions are well rooted in the text and purpose of the relevant statutes, as explicated in the analysis of Justice Souter that garnered four votes in *Heck*, and five votes in *Spencer*. In any event, respondents' criticisms are merits arguments that should be reserved for the merits stage.

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prerequisite." Opp. 12. Despite the narrow factual circumstances presented in *Jenkins*, it appears to be the most widely cited post-*Spencer* lower court decision on this subject. Indeed, the importance of *Jenkins* is such that a leading law review recently devoted an entire essay to a critique of its reasoning. Jason A. Jones, Note, *Prisoner Litigation and the Mistake of* Jenkins v. Haubert, 86 Cornell L. Rev. 140 (2000).

Respondents are similarly dismissive, *see* Opp. 9-10 & n.19, 12, of the three recent Seventh Circuit decisions cited by Randell. Pet. 13. In particular, these decisions illustrate the powerful effect on some federal judges of the position articulated by five Justices in *Spencer v. Kemna*. Before *Spencer*, the Seventh Circuit was one of the courts most insistent that *Heck's* favorable-termination requirement applies regardless of whether the Section 1983 plaintiff is still in custody; based on *Spencer*, the Seventh Circuit has reversed its position. *See* Jones, *supra* note 1, 86 Cornell L. Rev. at 153-54. In particular, respondents ignore Chief Judge Posner's view that *Spencer* requires use of a bright-line rule under which "a prisoner who cannot challenge the validity of his conviction" or other sanction "by either appeal or postconviction procedure can do so by bringing a civil rights suit for damages under 42 U.S.C. § 1983." *Carr v. O'Leary*, 167 F.3d 1124, 1127 (7th Cir. 1999) (citing *Spencer*). Chief Judge Posner's view of *Spencer* is shared by the Second Circuit, but is contrary to the law of the First, Fifth, Sixth and Ninth Circuits. Pet. 13-14. This Court should grant review to decide who is correct, so that the civil rights of Section 1983 plaintiffs do not vary from state to state, depending on where the plaintiff resides.

Respondents close their opposition by contending that "any division among the courts . . . is shallow at best and remains undeveloped." Opp. 13. But the dispute over whether a person who is not in custody under a criminal conviction is free to pursue Section 1983 litigation unhindered by the strictures of habeas corpus litigation is hardly new. More than a quarter century ago, Judge Newman noted the "absence of helpful legislative history" on this issue, and stated that plausible arguments can be made on both sides. *Pueschel v. Leuba*, 383 F. Supp. 576, 581 (D. Conn. 1974). In 1988 a leading scholar in this area noted the split in the lower courts over "whether section 1983 may be used to attack a conviction when federal habeas corpus is not available because, for example, the individual commencing the proceeding is not in custody." Martin A. Schwartz, *The* Preiser *Puzzle: Continued Frustrating Conflict*

*Between the Civil Rights and Habeas Corpus Remedies for State Prisoners*, 37 DePaul L. Rev. 85, 126 (1988); *see also id.* at 139-43. Even after this Court's decisions in *Heck* and *Spencer*, the federal appellate courts are still divided on this question, Pet. 11-14, as are the district courts. *See* Jones, *supra* note 1, 86 Cornell L. Rev. at 155-56. A definitive resolution of this question should be provided as soon as possible.

**2. The question presented is adequately presented by Randell's case, as Randell filed his lawsuit while no longer in custody on the sentence at issue, and the relevant factual allegations are uncontroverted**

Apart from their efforts to minimize the significance of the circuit split over the proper application of *Heck* and *Spencer*, respondents urge that "this case simply does not raise" the question presented by the petition. Opp. 5. They are mistaken.

The question presented by the petition and which divides the lower courts is whether *Heck*'s favorable-termination requirement — originally articulated in a case where a prisoner sought to use Section 1983 to indirectly win his release without meeting the habeas requirements — has any application to a plaintiff who is *not* in custody and hence is not eligible to seek habeas relief. Pet. i.

For a plaintiff to properly present this question to this Court, the lawsuit need only challenge the fact or duration of past confinement, and allege that the plaintiff is not in custody on the sentence in question. Randell's lawsuit does that. Respondents agree that Randell's lawsuit alleges the following facts: (1) Randell was sentenced to 60 months of incarceration; (2) while out on parole before serving the full sentence, Randell was arrested on a DWI charge; (3) because of a "blue warrant" detainer imposed by respondents, Randell could not make bond but instead was held under the blue warrant from September 27, 1996, to June 26, 1997; (4) Randell never received credit for these 272 days of incarceration toward the completion of his 60-month sentence, so that he was forced to serve part of his time

over again, beyond the term of his lawful sentence; and (5) when Randell filed his present lawsuit, on June 18, 1999, he had fully served his 60-month sentence, and was no longer in custody on it. Pet. 2-3; Opp. 2-3.[2] These allegations are more than enough for Randell's case to serve as an adequate vehicle for resolving the question presented. *Compare Green*, *supra*, 219 F.3d at 55, 60 n.3 (resolving this question in favor of the Section 1983 plaintiff with minimal reference to the facts, noting: "Because it does not appear that [plaintiff] is presently in state custody, his § 1983 action is not barred by *Heck*.").

Respondents argue that under *Spencer v. Kemna*, to avoid *Heck*'s favorable-termination requirement it is not enough for Randell to show that he is ineligible for habeas relief because he is no longer in custody. According to respondents, Randell was required to allege that "he lacked any other avenue to correct the alleged error in his TDCJ sentence." Opp. 5. But respondents never advanced this argument below (indeed, they never even appeared below), and thus they have waived the ability to advance it in this Court. *E.g.*, *Jenkins v. Anderson*, 447 U.S. 231, 234-35 n.1 (1980); *FTC v. Grolier, Inc.*, 462 U.S. 19, 23 n.6 (1983); *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 551-52 n.3 (1990); *Trest v. Cain*, 522 U.S. 87, 89 (1997). The district court based its dismissal solely on the fact that Randell had not won habeas relief — relief that he concededly is not eligible to seek. App. 6a; *see also* Pet. 4 n.2.

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[2] Seeking for the first time to offer a factual defense to these allegations, respondents observe that Randell "does not explain if these nine months were a sentence for the DWI offense." Opp. 3; *see also* Opp. 8 (asserting that this is a "critical fact" that "remains unclear"). But there is no indication in the record that Randell was even convicted, much less sentenced, on the DWI charge that triggered his blue-warrant detention pending a ruling on parole revocation. Randell's allegation that he was held for 272 days under a detainer that prevented him from making bond on the DWI charge, and that he never received credit for this time, is uncontroverted. And given that the denial of credit for this time was mandated by the relevant Texas statute, *see* pp. 7-8 & note 3, *infra*, there is no evident basis for questioning this allegation.

Even if respondents had not waived this point, they have identified no vehicle other than this Section 1983 action by which Randell might be able to remedy his injury. Because this action is Randell's sole federal remedy, any alternative remedy would have to lie under Texas law. But respondents do not suggest that their actions even arguably violated Texas law. It would appear that respondents complied with Texas law in denying Randell credit for the 272 days he was held for an alleged parole violation, pending his parole revocation hearing and the actual revocation of his parole. Apparently unique among the 50 States, Texas by statute provides that if "a person's parole . . . is revoked," his or her remaining sentence "is computed *without credit* for the time from the date of the person's release *to the date of revocation*." Tex. Gov't Code Ann. § 508.283(b) (Vernon Supp. 2000) (emphasis added). This provision dates to 1973, when the legislature eliminated a provision that had entitled an alleged parole violator to "time credit for any period" of incarceration "after his arrest on the parole revocation charges." *Ex parte Canada*, 754 S.W.2d 660, 661-62 n.2 (Tex. Crim. App. 1988).

Pursuant to the "mandatory language" of this statute, *id.* at 664, which was most recently continued in force and amended in 1999, Texas officals are required to deny alleged parole violators credit for the weeks or months they are held under blue warrants prior to any ultimate revocation of their parole.[3] Further, parole

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[3] In *Ex parte Canada*, a prisoner brought a challenge to this mandatory statutory provision, but the Texas courts held that the prisoner lacked standing to object to it. 754 S.W.2d at 664-65. The *Canada* decision did invalidate a statutory provision that gave officials *discretionary* authority to deny alleged parole violaters credit for time served under a blue warrant even where their parole is continued following the parole revocation hearing. *Id.* at 662, 665-68; *see also Ex parte Price*, 922 S.W.2d 957, 958 (Tex. Crim. App. 1996) ("In *Canada*, we held that Article 42.18, § 15(a), V.A.C.C.P., as it relates to the discretion to grant or deny time credit to a parolee confined pursuant to a pre-revocation warrant, is violative of parolee's due course of law under Tex. Const., Art. I, § 19."); *Ex parte Bates*, 978 S.W.2d 575, 576-78 (Tex. Crim.

violators like Randell who do not waive their right to a parole revocation hearing, whose parole is ultimately revoked, and who thereby end up serving more than their lawful sentence, are excluded from the remedy enacted by the Texas legislature for victims of wrongful imprisonment. *See* Tex. Civ. Prac. & Rems. Code Ann. § 103.001 (Vernon 1997) (providing compensation only to persons who served time and were "not guilty of the crime" and have "received a full pardon"); *see also* Tex. Const., Art. 3, § 51-c (state legislature only authorized to "grant aid and compensation" to a person who "served a sentence in prison . . . for an offense for which he or she is not guilty.").

Unable to identify an alternative remedy under Texas law that Randell might now pursue, respondents focus on Randell's past actions. Respondents complain that Randell does not allege "that he attempted to correct the alleged error in his term of confinement through notice to TDCJ via the prison grievance system." Opp. 6; *see also* Opp. 8. But a grievance system for remedying "a complaint by an inmate who alleges that time credited on the inmate's sentence is in error," Tex. Gov't Code Ann. § 501.0081(a) (Vernon Supp. 2000), did not even *exist* in Texas until January 1, 2000, several months after this lawsuit was filed, and several years after the underlying events took place. *See Ex parte Whiteside*, 12 S.W.3d 819, 824 (Tex. Crim. App. 2000) (Johnson, J., concurring)).

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Const., Art. I, § 19."); *Ex parte Bates*, 978 S.W.2d 575, 576-78 (Tex. Crim. App. 1998) (summarizing *Canada* holding, and applying it to eliminate trial court discretion in an analogous context); *Jimerson v. State*, 957 S.W.2d 875, 877 (Tex. App. Texarkana 1997) (*Canada* held "that the statute was unconstitutional so far as it granted discretion to grant or deny credit to a parolee for the time spent in confinement before the revocation hearing."); *Ex parte Adams*, 941 S.W.2d 136 (Tex. Crim. App. 1997); *Ex parte Evans*, 964 S.W.2d 643 (Tex. Crim. App. 1998).

Respondents also complain that "Randell does not allege that he sought habeas relief while incarcerated." Opp. 6. But respondents failed to argue below that Randell was required to address this factual point, thereby disabling them from arguing it at this juncture. See p. 6, *supra*. If this Court ultimately decides the question presented by articulating a legal rule under which this factual point is somehow relevant, respondents will presumably raise the point on remand. Randell is prepared to prove that he did seek habeas relief while incarcerated.

In sum, this case adequately presents the question set forth in the petition. This Court should grant review to decide that question and thereby resolve the confusion over *Heck* and *Spencer* that currently exists in the lower courts.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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